



INSPECTOR GENERAL

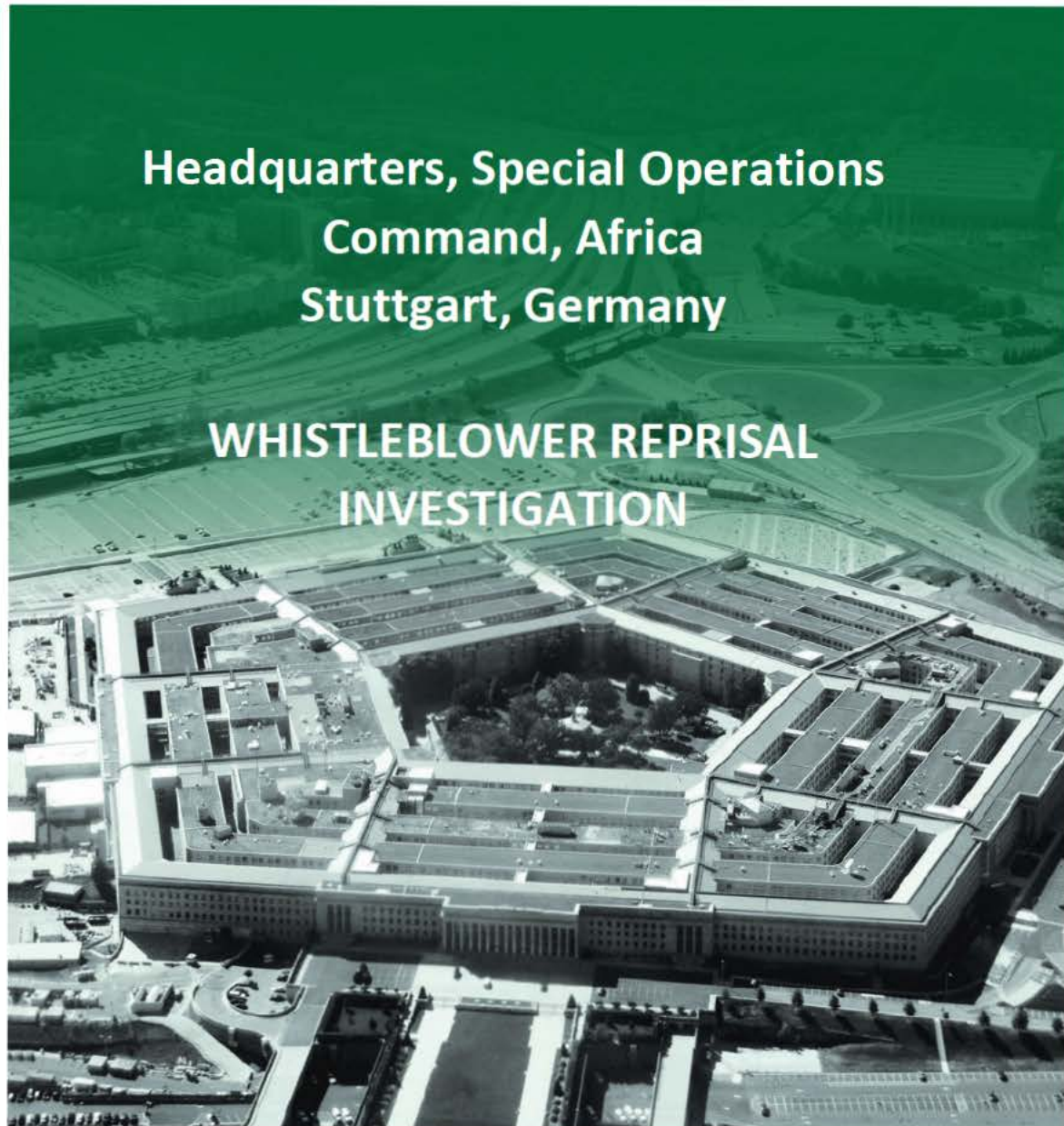
U.S. Department of Defense

August 9, 2016



**Headquarters, Special Operations
Command, Africa
Stuttgart, Germany**

WHISTLEBLOWER REPRISAL INVESTIGATION



INTEGRITY ★ EFFICIENCY ★ ACCOUNTABILITY ★ EXCELLENCE

**The document contains information that may be exempt from
mandatory disclosure under the Freedom of Information Act.**

WHISTLEBLOWER REPRISAL INVESTIGATION
[REDACTED]
HEADQUARTERS, SPECIAL OPERATIONS COMMAND, AFRICA
[REDACTED]
STUTTGART, GERMANY

I. EXECUTIVE SUMMARY

We conducted this investigation in response to allegations that [REDACTED], [REDACTED], Special Operations Command Africa (SOCAFRICA), [REDACTED], Stuttgart, Germany, was subjected to reprisal via: 1) a reduced performance award, 2) a detail, 3) a significant change in duties and responsibilities, 4) a proposed disciplinary action of suspension or dismissal, 5) a letter of reprimand (LOR), and 6) a constructive reassignment for being perceived to have made two anonymous IG complaints, communications to an investigating officer (IO), cooperation with a Department of Defense Office of the Inspector General (DoD OIG) investigation, and a communication to the DoD Hotline.

We substantiated allegations #1 and #5. We did not substantiate allegations #2, #3, #4, and #6 above.

We found Complainant made and was perceived to have made disclosures protected by statute. We also determined that the evidence showed that the reduced performance award and the letter of reprimand were personnel actions that would not have occurred absent the perceived protected disclosures.

With regard to the allegations we did not substantiate, we found that although one responsible management official (RMO) [REDACTED], [REDACTED], SOCAFRICA, forwarded requests that suspension or dismissal be considered for Complainant, he never issued proposed disciplinary or adverse action in the form of a proposed suspension or dismissal to Complainant.¹ Additionally, we found Complainant did not experience a significant change in duties and responsibilities; accordingly, we did not analyze the alleged significant change in duties and responsibilities for reprisal. Finally, we found Complainant's detail and constructive reassignment were personnel actions; however, they were voluntary and therefore not analyzed for reprisal.

We determined the reduced performance award and an LOR were personnel actions that would not have occurred absent the protected disclosures. We initially found that [REDACTED] reprised against Complainant and by letter dated April 6, 2015, we gave him the opportunity to comment on the preliminary report of investigation. In a memorandum dated May 7, 2015, [REDACTED] responded to our preliminary report and disagreed with our initial conclusion that

¹ All titles and ranks identified reflect the rank and title held at the time of the investigation and may not reflect an individual's current title or rank.

[REDACTED]

he reprised against Complainant. After carefully considering [REDACTED] response and re-examining the evidence, we have revised our report, where appropriate, but we stand by our original conclusion that [REDACTED] reprised against Complainant.²

We determined Rear Admiral (RDML) Brian L. Losey, U.S. Navy (USN), Commander, SOCAFRICA, did not take or fail to take, or threaten to take or fail to take, or influence others to take, threaten to take, or fail to take any personnel action against Complainant.

In sum, we concluded [REDACTED] reprised against Complainant by taking actions inconsistent with the principles of Title 5, United States Code (U.S.C.), Section 2302.

We recommend that the Secretary [REDACTED]:

- grant Complainant a performance award commensurate with his performance evaluation for 2012;
- ensure that the letter of reprimand has been officially removed from files pertaining to Complainant and is not contained in Complainant's official record; and
- determine whether Complainant's professional or promotion opportunities may have been impacted as a result of the administration of the LOR and, if so, direct that remedial action be taken.

We recommend that the Secretary [REDACTED] take appropriate action regarding [REDACTED] substantiated reprisal against Complainant.

² While we have included what we believe is a reasonable synopsis of [REDACTED] response, we recognize that any attempt to summarize it risks oversimplification and omission. Accordingly, we incorporated [REDACTED] comments where appropriate throughout the report and provided a copy of [REDACTED] response to the cognizant management officials with this report.

[REDACTED]

II. BACKGROUND

On July 15, 2010, Complainant began his employment as the [REDACTED] for SOCAFRICA, a sub-unified command of United States Africa Command (U.S. AFRICOM, hereinafter referred to as AFRICOM). Complainant served as SOCAFRICA's [REDACTED]. Complainant's supervisory chain of command was [REDACTED] and the Commander, SOCAFRICA.

The RMOs served at SOCAFRICA as follows:

RDML Losey, Commander, June 21, 2011, to June 7, 2013;

[REDACTED]

Complainant alleged the RMOs administered personnel actions in reprisal for his protected disclosures.

III. SCOPE

The investigation covered the period from July 13, 2011, to July 2013. The investigation included interviews of Complainant, the RMOs, 28 witnesses, Human Resources personnel, and Agency officials.⁴ In addition, we reviewed Agency-provided information, email personal storage tables, memoranda for record, and comparator information.

IV. STATUTORY AUTHORITY

The Department of Defense Office of Inspector General (DoD OIG) conducts whistleblower reprisal investigations involving civilian appropriated-fund employees of the Department and applicants under Section 7(a) and 8(c)(2) of "The Inspector General Act of 1978," as amended. Further, under DoD Directive 5106.01, "Inspector General of the Department of Defense," DoD OIG receives and investigates such complaints of reprisal generally in accordance with Title 5, United States Code, Section 2302.

³ On November 10, 2011, [REDACTED] replaced [REDACTED].

⁴ We interviewed RDML Losey on February 21 and December 13, 2012. We requested to interview RDML Losey in September 2013, and on September 5, 2013, RDML Losey (through his attorney) invoked his right to remain silent.

[REDACTED]

V. FINDINGS AND ANALYSIS

A. Did Complainant make a protected disclosure or was he perceived as having made a protected disclosure? Yes

Complainant was perceived as being one of the individuals likely to have made the July 13 and November 17, 2011, anonymous complaints to the DoD Hotline and [REDACTED] respectively, described below. Although Complainant was not actually the source of these anonymous IG complaints, an appropriated-fund civilian is protected from reprisal for a disclosure he is perceived of making as long as the disclosure at issue would be protected under the statute.

July 13, 2011, DoD Hotline Complaint

[REDACTED]

On July 13, 2011, an anonymous person [REDACTED] filed a DoD Hotline complaint alleging that RDML Losey [REDACTED]

[REDACTED] DoD OIG referred the complaint to the Naval Inspector General (NAVINSGEN) on September 16, 2011. NAVINSGEN investigated and determined the complaint lacked merit. The case was closed on September 27, 2011, and NAVINSGEN notified RDML Losey on September 28, 2011, that the case was closed.

[REDACTED] reported having many conversations about the IG complaint with RDML Losey from late September through early November 2011. [REDACTED] testified to us RDML Losey stated he was determined to find out who made the IG complaint, having narrowed it down to three people he suspected. [REDACTED] stated RDML Losey perceived the source of the IG complaint to be either [REDACTED], SOCAFRICA; or a third person RDML Losey would not name.

[REDACTED], stated in an email to DoD OIG that he and RDML Losey (prior to November 4, 2011) met to discuss a recent SOCAFRICA inspection conducted by Special Operations Command (SOCOM). [REDACTED] stated that during the meeting, RDML Losey was "frustrated and felt that members of his command were disloyal to him, and that they should have addressed any concerns directly with him rather than through

[REDACTED]

Inspector General channels.” As a result, [REDACTED] sought more information about the status of the IG complaint and on November 4, 2011, emailed RDML Losey stating:

Sir, I checked on the DoD IG complaint you mentioned in our recent meeting. The complaint was anonymously submitted to the DoD Hotline. The investigation was closed in late September 2011, and the allegations were not substantiated. No further action is being taken.

Further, he advised RDML Losey that complaints against senior officials are common and not to engage in reprisals, commenting that “a cover-up or reprisal engaged in by a subject related to an IG investigation is usually far worse than the substance of the original complaint.” RDML Losey replied, “Roger-appreciate the insights and will follow the advice.”

RDML Losey testified to us that he did not understand why someone in his command would file a complaint against him [REDACTED]. RDML Losey testified that he discussed this issue with his front office and wondered why someone would not come to him first instead of filing a complaint. RDML Losey stated that he could not understand why someone would not just say:

‘Hey, boss, did you know that you’re not entitled to this ... It’s like, I don’t understand. Why didn’t somebody just fess up to it?’

... [REDACTED], I said [to [REDACTED]], ‘Why didn’t you tell me?’ And then we engaged in a speculative discussion of, you know, only three officers knew, [REDACTED].

According to [REDACTED], in testimony to us, after they had already had numerous conversations about the IG complaint, RDML Losey asked him his opinion on who he thought would have made the complaint, and they discussed a list of possibilities.

[REDACTED] stated RDML Losey suspected [REDACTED]. [REDACTED] assured RDML Losey he knew the [REDACTED] and [REDACTED] had not made the anonymous complaint. RDML Losey told [REDACTED] to talk to them to find out if they made the complaint. [REDACTED] also stated that the topic of who filed the complaint was discussed repeatedly over the course of 3 months, including an instance approximately the last week of October 2011 in which RDML Losey told him again that he knew it was either [REDACTED], [REDACTED], or a third person, and that he (RDML Losey) would “find out who did it” and “cut the head off this snake and we’ll end this.” [REDACTED] reiterated that he had talked to [REDACTED] and [REDACTED], and it was neither of them.

[REDACTED]

On October 24 and 29, 2011, RDML Losey called [REDACTED] and [REDACTED] into his office and discussed the IG complaint. [REDACTED] testified to us that he told RDML Losey, "Sir, I had absolutely nothing to do with this" and that [REDACTED] "would never submit an IG complaint against you," but that RDML Losey was convinced someone from [REDACTED] was responsible. [REDACTED] wrote a memorandum for record (MFR) on October 24, 2011, which stated:

On Monday morning at 0745 prior to his travel on Navy business ... He mentioned the IG complaint that had been filed against him alleging [REDACTED]. He said that he'd narrowed it down to 3 people who could have submitted it. He said, 'I'll find out who did it.'

In testimony to us, [REDACTED] denied ever hearing RDML Losey say he had narrowed it down to three people and was determined to find out who did it, and [REDACTED] said he did not recall the October 24 and 29, 2011, meetings in RDML Losey's office with [REDACTED]. When asked if he ever heard RDML Losey say he suspected someone of making the complaint, [REDACTED] testified:

I did ... Well, and he didn't suspect so much as he said, 'Who would have done this?' And he rattled off a couple of names. I think he mentioned [REDACTED], and he mentioned [Complainant] as [REDACTED] that might have lodged the complaint.

[REDACTED] also stated that RDML Losey told him that "aside from [REDACTED], the only other folks that would have known about that were [REDACTED] and [Complainant]." [REDACTED] stated that in the discussion regarding the July 13, 2011, DoD Hotline complaint, RDML Losey also brought up the November 17, 2011, AFRICOM IG complaint discussed below.

When asked about the IG complaint involving [REDACTED], [REDACTED] testified to us that RDML Losey told him someone from the command lodged the complaint and that RDML Losey referred to a group of SOCAFRICA civilians, including Complainant, [REDACTED] SOCAFRICA, as "... somebody within that group would probably be somebody that would do that complaint."

[REDACTED], testified to us that either [REDACTED] or [REDACTED] told him that RDML Losey had "narrowed it down to three people and ... he was going to figure out who complained and cut the head off." After hearing that, [REDACTED] recommended to [REDACTED], around the last week of October or first week of November 2011, that he advise RDML Losey to "tone it down and be very careful about the appearance of [REDACTED]"

reprisal” and “we got to make sure the boss is not stepping over the line in terms of reprisal.” [REDACTED] documented that conversation on November 4, 2011, in an MFR.

[REDACTED] stated that RDML Losey brought up the IG complaint, telling him [REDACTED] the “IG complaint was malicious.” [REDACTED] testified about this discussion as follows:

I remember saying, ‘Brian [RDML Losey], you can’t say out loud that using the IG system is malicious. You can’t say that.’ That was right around that same time, of the first week in November.

[REDACTED] stated that RDML Losey was upset with him, and [REDACTED] explained:

... [B]ecause he didn’t think I was supporting him in terms of some other things that were happening, and I was doing my best. I was trying to get him some more options on some issues, and he just thought I wasn’t supporting him and he wanted to talk to me about it. But when I said, ‘Brian, you can’t use, I don’t think the IG would appreciate it if you said using their system was malicious.’ And he kind of laughed. He goes, ‘Yeah, I know, but it was malicious, [REDACTED].’ I thought okay, he didn’t get it, then. He’s not listening to me.

I was really surprised that RDML Losey got so hot on it. ... So I was kind of surprised when this — I thought this complaint came up that RDML Losey reacted so strongly to it. I thought that was part of GO Indoc [General Officer Indoctrination] that said, ‘Hey, you’re going to get IG complaints. Handle it.’

[REDACTED] testified that RDML Losey suspected [REDACTED], [REDACTED], and a third unnamed person of making the complaint. [REDACTED] testified that RDML Losey suspected someone in [REDACTED] where Complainant worked. [REDACTED] stated RDML Losey named Complainant as someone who might have made the complaint. [REDACTED] testified to us that RDML Losey referred to a group of SOCAFRICA civilians (including Complainant) as probably someone who would make the complaint. RDML Losey stated he speculated [REDACTED] (where Complainant worked) made the complaint.

November 17, 2011, AFRICOM IG Complaint

On November 17, 2011, the AFRICOM IG notified RDML Losey that they had received an anonymous letter requesting an assessment of a “toxic” SOCAFRICA command climate. [REDACTED] stated RDML Losey was livid after receiving the complaint, and he called

[REDACTED]

[REDACTED] into his office and told him to deliver a message to “the locker room” and tell them to:

... play nice and wait until I’m gone. Smile. Act like you’re going to work ... but if you continue to undermine my authority as a commander, I’m going to bury each one of them. I’m going to come after them and I’m going to [make] it very unpleasant.

[REDACTED]

RDML Losey stated that he did not apply “locker room,” “old guard,” or “cabal” to any group. Although this was a one-on-one conversation between him and [REDACTED], we were able to ascertain through others’ testimony that RDML Losey and [REDACTED] used pejorative terms when talking about [REDACTED], [REDACTED], [REDACTED], and Complainant. [REDACTED] testified that he has heard RDML Losey use the terms “cabal” and “SOCAFRICA plankholders” when referring to [REDACTED], [REDACTED], [REDACTED], and Complainant. [REDACTED] testified that he used the word “cabal” to describe [REDACTED], [REDACTED], and Complainant, which gives credence to [REDACTED] testimony regarding RDML Losey’s belief of a “locker room” conspiracy.

December 16, 2011, Communication to IO, Command Directed Investigation (CDI, [REDACTED])

[REDACTED]. On December 16, 2011, [REDACTED] appointed an investigating officer (IO) to conduct a CDI (hereinafter referred to as the [REDACTED] CDI) into the facts and circumstances concerning the use [REDACTED]. The CDI investigated the alleged unauthorized use of the autopen as possible leadership failure, dereliction of duty, disobeying lawful orders, and engaging in conduct unbecoming an officer and gentleman, by [REDACTED].

On December 28, 2011, and on February 16, 2012, Complainant provided sworn statements to the IO. Those statements contained information including but not limited to his duty title, his knowledge of SOCAFRICA [REDACTED], his knowledge of RDML Losey’s policy [REDACTED], and his favorable characterization of [REDACTED]. In these statements, Complainant did not disclose information about a violation of law, rule, or regulation; gross mismanagement; gross waste of funds; an abuse of authority; or a substantial and specific danger to public health or safety. Accordingly, Complainant’s communications to the IO are not protected disclosures.

[REDACTED]

January 16, 2013, Communication to DoD Hotline

On January 16, 2013, Complainant filed a DoD Hotline complaint alleging RDML Losey took or directed personnel actions against him in reprisal for his perceived and protected disclosures made in his sworn statement during [REDACTED] CDI.

February 19, 2013, Communication to DoD OIG

On February 19, 2013, Complainant clarified in his testimony to us that he believed that [REDACTED] also reprised against him.

Complainant's January 16, 2013, DoD Hotline complaint and February 19, 2013, testimony contained reprisal allegations that he reasonably believed evidenced violations of law; accordingly, they are protected disclosures.

A.2. Did Complainant cooperate with or disclose information to the Inspector General of an agency? Yes.

February 22, 2012, Cooperation with DoD OIG ([REDACTED])

On February 22, 2012, Complainant provided testimony to the DoD OIG during our investigation of allegations that [REDACTED] was reprised against. Complainant's testimony constituted cooperation with the IG of an agency. Accordingly, Complainant's testimony is a protected disclosure.

B. Was Complainant the subject of an actual, threatened, or recommended personnel action? Yes

Although we initially considered RDML Losey a subject in this case, our investigation determined that he did not take, threaten to take, fail to take, or influence others to take, threaten to take, or fail to take, any personnel action against Complainant. Consequently, we advised the Secretary of the Navy and the Naval IG by letter dated March 31, 2015, that RDML Losey was no longer considered a subject in the case. Accordingly, we did not consider RDML Losey a responsible management official in this report.

Reduced Performance Award – Yes

On September 20, 2012, [REDACTED] reduced the 40-hour performance award submitted for his approval by the senior rater for the civilian appraisal period August 1, 2011, to July 31, 2012. A decision concerning pay, benefits, or awards is a personnel action.

Detail – Yes

[REDACTED] testified to us that RDML Losey tasked him with identifying one SOCAFRICA employee per directorate to [REDACTED] and in June 2012, he discussed the task with Complainant, who volunteered [REDACTED]

[REDACTED] stated he told Complainant that despite the difficulty his absence would cause the [REDACTED], the [REDACTED] greatly needed [REDACTED], and he would discuss the matter with Complainant's supervisor, [REDACTED].

According to [REDACTED], Complainant requested the [REDACTED] detail in order [REDACTED]

Complainant testified to us that he requested the detail. [REDACTED]

A detail is considered a personnel action; however, the evidence indicates Complainant volunteered for the detail. Accordingly, we did not review Complainant's detail for reprisal.

Proposed Disciplinary Action – No

[REDACTED], on August 21, 2012, RDML Losey appointed [REDACTED], SOCAFRICA, as an IO to conduct a CDI into irregularities in SOCAFRICA's civilian pay system "hereinafter referred to as the time and attendance CDI" from January 1, 2010, to August 21, 2012.

On November 19, 2012, [REDACTED] completed the time and attendance CDI and on December 13, 2012, transmitted a MFR discussing his findings to RDML Losey, who approved the investigation. [REDACTED] found the following pertaining to Complainant:

Finding 3: Between the dates of 2 January 2011 and 1 July 2012, [Complainant] violated the intent of ACSOI [AFRICOM Special Operations Instruction] 1400.02, DoD FMR [Financial Management Regulation] (not cited), and AFRICOM Policy Directives on [REDACTED]

Finding 4: Between the dates of 29 August 2010 and 1 July 2012, [Complainant] violated the intent of ACSOI 1400.02, DoD FMR (not cited), and AFRICOM Policy Directives o [REDACTED]

Finding 8: During a random data search to evaluate employees with higher than normal compensation time, overtime, and premium time, [Complainant] stood out as having a high amount of overtime, yet a lack of substantiating documentation that validated this overtime.

The IO recommended Complainant receive a verbal counseling.

On December 14, 2012, the SOCAFRICA SJA provided a legal review of the time and attendance CDI [REDACTED]

On December 20, 2012, [REDACTED] provided a Management Employee Relations Specialist (MERS) a copy of [REDACTED] recently completed MFR on the CDI and the accompanying SOCAFRICA SJA legal review referenced above, and wrote to the MERS, "...the latest investigation adds [Complainant] ... as offenders of the time and accounting system established at SOCAFRICA IAW [in accordance with] AFRICOM Instructions and DA [Department of the Army] regulation." [REDACTED] recommended to the MERS disciplinary action against Complainant ranging from written reprimand to dismissal and requested "...help in evaluating the Douglas factors and receiving your recommendation on the appropriate level of disciplinary action."

The MERS then provided [REDACTED] a disciplinary/adverse action checklist for him to fill out concerning Complainant. On January 30, 2013, [REDACTED] (through SOCAFRICA SJA) returned the checklist (but did not identify a requested disciplinary action, nor did he sign the checklist) on which he annotated that Complainant had failed to follow established (time and attendance) rules and regulations and asked, "Please advise us on your recommendation." On February 5, 2013, the MERS emailed [REDACTED] and said, "... I am still working on putting my draft actions together. This whole case is complex and will take relatively some time to put together ... I will work on the drafts, and once they are completed they will be forwarded to [an AFRICOM Labor Attorney] for her review, and concurrence."

On March 4, 2013, the AFRICOM SJA emailed [REDACTED] advice on [REDACTED]

On March 5, 2013, [REDACTED] replied stating he appreciated the SJA's analysis but to process the personnel actions, writing that "... I am compelled to pursue removal of [REDACTED] and [Complainant]."

On March 8, 2013, [REDACTED] requested the MERS "prepare and process" disciplinary action for Complainant. Specifically, [REDACTED] requested a 14-day suspension and reprimand for Complainant. On March 26, 2013, the MERS drafted a "Notice of Proposed 14 Day Suspension" for Complainant, and on April 4, 2013, the MERS sent an AFRICOM Labor

[REDACTED]

Attorney (but not [REDACTED]) for a legal review the draft notice of Complainant's proposed suspension.

However, [REDACTED] requests that suspension or dismissal be considered for Complainant never advanced to the stage of actually administering the proposed disciplinary or adverse action to Complainant.⁵ [REDACTED]

[REDACTED] responded to the email, "Very well...move out!" [REDACTED] requests that suspension or dismissal be considered were separate and distinct from his administration of an LOR to Complainant because proposals are not issued for an LOR. Further, the evidence does not indicate that [REDACTED] ever provided Complainant a disciplinary action proposal. As a result, [REDACTED] did not take or fail to take, or threaten to take or fail to take, a personnel action against Complainant when he forwarded disciplinary action recommendations to the MERS.

Significant Change in Duties and Responsibilities – No

In February 2013, Complainant returned from the [REDACTED] detail to his position as [REDACTED], SOCAFRICA, and alleged his primary duties and responsibilities decreased. However, we found Complainant's duties and responsibilities remained the same. Therefore, we concluded that a personnel action did not take place and will not be analyzed further.

Constructive Reassignment – No

On May 1, 2013, Complainant accepted a position as [REDACTED] ([REDACTED]) at the [REDACTED]. After he accepted the position, the [REDACTED] office offered him a [REDACTED] position at the [REDACTED] level, which he accepted on June 6, 2013. Complainant alleged to us that he was forced to seek other employment (a constructive reassignment). However, an employee-initiated action is presumed to be voluntary, and we found insufficient evidence to support Complainant's allegation. Accordingly, we found no constructive reassignment occurred.

LOR – Yes

In late May, 2013, the MERS, the AFRICOM SJA, [REDACTED], the SOCAFRICA SJA, and Ms. Rhonda Diaz, Senior Executive Service, Deputy Director, Resources Directorate,

⁵ Pursuant to Federal law and regulation, the removal, demotion, or suspension of any duration of a civilian appropriated fund employee requires a three-step process involving a notice to the employee by the proposing official, an opportunity for the employee to reply, and a decision by the deciding official. See 5 U.S.C. 7513, 5 U.S.C. 7503, and 5 C.F.R. 752.

[REDACTED]

AFRICOM, met to discuss, as the MERS put it, “why it was taking so long for these actions [disciplinary action concerning Complainant and others].”

The MERS testified to us:

What [REDACTED] wanted was an explanation from legal as to what was the problem, was there a problem, and what did he need to do to get these actions processed....they explained to him the issue was the [AFRICOM Labor Attorney] that takes care of these actions [REDACTED] ...the actions were not going to be reviewed or completed until [REDACTED] ... so everyone agreed to wait because it was the most appropriate thing to do.”

On May 22, 2013, AFRICOM SJA completed a legal review of [REDACTED] request for disciplinary action against [REDACTED] and [REDACTED]. The AFRICOM SJA testified to us:

... [REDACTED]

[REDACTED]

Additionally, he stated that [REDACTED]

[REDACTED] ”

On July 2, 2013, a SOCAFRICA Assistant SJA emailed [REDACTED]

[REDACTED] responded to the email, “Very well...move out!”

On July 3, 2013, [REDACTED] administered Complainant an LOR for misconduct and failure to follow policy. Specifically, the LOR admonished Complainant for failing to adhere to the letter and intent of DoD FMR (not cited) and AFRICOM Policy Directive (not cited) by certifying his supervisor’s time and attendance. Complainant was further admonished for failure

[REDACTED]

to adhere to the letter and intent of DoD FMR, AFRICOM Policy Directives, and AFRICOM Special Operations Instruction (ACSOI) 1400.02 [REDACTED]

[REDACTED] The LOR is a corrective action and, accordingly, it is a personnel action.

C. Was the protected disclosures or cooperation with the Inspector General of an agency a contributing factor in the agency's decision to take, not take, threaten to take, or threaten not to take the personnel actions? Yes

RMO Knowledge

A preponderance of evidence established [REDACTED] had knowledge of RDML Losey's belief that Complainant was one of three people who likely made the first two protected disclosures (July 13 and November 17, 2011, IG complaints) because RDML Losey advised [REDACTED] of his perceptions. [REDACTED] knowledge of RDML Losey's perceptions occurred prior to the September 2012 performance award and the July 2013 LOR. Thus, the two disclosures were contributing factors in the personnel actions.

A preponderance of the evidence further established [REDACTED] had knowledge of Complainant's communication to DoD Hotline in May 2013 prior to administering Complainant's LOR in July 2013. Thus, [REDACTED] knowledge of this disclosure occurred prior to the administration of the LOR, so the communication to the DoD Hotline was a contributing factor in the personnel action.

July 13, 2011, DoD Hotline Complaint

[REDACTED] testified to us that he learned of the complaint in October 2011 when RDML Losey told him somebody had submitted an IG complaint [REDACTED].

A preponderance of the evidence established that [REDACTED] knew RDML Losey suspected Complainant of making the July 13, 2011, IG complaint from the discussions he had with RDML Losey in the October/November 2011 timeframe. A preponderance of the evidence indicates that [REDACTED] perceived Complainant as a likely source of the DoD Hotline complaint.

November 17, 2011, AFRICOM IG Complaint

[REDACTED] testified to us he had knowledge of the AFRICOM IG complaint regarding toxic SOCAFRICA command climate but did not attribute it to Complainant. However, [REDACTED] stated he knew RDML Losey suspected Complainant of making the November 2011 IG complaint.

A preponderance of the evidence established that [REDACTED] knew RDML Losey suspected Complainant, and as a result, he perceived Complainant as the source of the AFRICOM IG complaint.

[REDACTED]

February 22, 2012, Cooperation with DoD OIG [REDACTED]

[REDACTED] testified that he had knowledge of the DoD OIG investigation but had no knowledge that the DoD OIG interviewed Complainant. A preponderance of the evidence established [REDACTED] did not know Complainant participated in the February 2012 DoD OIG investigation of [REDACTED] reprisal allegation.

January 16, 2013, Communication to DoD Hotline

[REDACTED] testified that he first learned of the January 16, 2013, DoD Hotline complaint regarding reprisal allegations made by Complainant when DoD OIG contacted him on May 23, 2013, to schedule his June 20, 2013, interview.

A preponderance of the evidence established [REDACTED] knew of this protected disclosure as of May 23, 2013.

Timing between the IG Complaints and Personnel Actions

The timing between the first disclosure (July 2011 anonymous IG complaint) and last two disclosures (January 16, 2013, DoD Hotline complaint and the February 19, 2013, DoD OIG interview) suspected to be made by Complainant occurred within an approximate 18-month period. By November 2011, [REDACTED] perceived Complainant as someone who may have made both the July 27, 2011, IG complaint and the November 2011 AFRICOM IG complaint. [REDACTED] had knowledge of Complainant's January 16, 2013, disclosure to the DoD Hotline on May 23, 2013.

[REDACTED] knowledge of Complainant's first and last disclosures occurred approximately 10 to 12 months before he administered Complainant's first personnel action (the September 2012 reduced performance award) and 20 months before he administered Complainant the July 2013 LOR. [REDACTED] also knew of Complainant's January 2013 DoD Hotline disclosure in May 2013, 6 months before he administered Complainant an LOR.

Accordingly, under 5 U.S.C. 2302, the timing of the personnel actions would lead a reasonable person to believe that Complainant's disclosures could have been a contributing factor in [REDACTED] decision to take the personnel actions.

A preponderance of the evidence established that timing and [REDACTED] knowledge of RDML Losey's suspicion that Complainant was one of the individuals who could have made the July and November 2011 anonymous IG complaints was a contributing factor in his decision to take personnel actions against Complainant.

[REDACTED]

D. Does clear and convincing evidence indicate that the same action would have been taken against Complainant absent the protected disclosures?

Performance Award – No

Stated Reasons

In September 2012, [REDACTED] prepared Complainant's 2012 performance appraisal along with a recommended performance award and provided the appraisal along with several other SOCAFRICA employees' appraisals to [REDACTED] for review and approval. [REDACTED] returned several days later to pick up the performance appraisals that contained his initial performance award recommendations and noticed that Complainant's performance award was changed from 40 hours to 16 hours.

[REDACTED] said he reviewed Complainant's performance appraisal and believed that [REDACTED] assessment of Complainant's work was "lukewarm." Additionally, [REDACTED] viewed [REDACTED], senior rater on Complainant's performance appraisal, as being an optimist regarding Complainant's performance, and that is why [REDACTED] gave the "Successful" rating. [REDACTED] assessed Complainant's performance as "average" and deficient in his level awareness on applicable regulations, policies, and processes. [REDACTED] testified that Complainant's appraisal was rather "pedestrian" and merely indicated Complainant's work performance equated with his position description; therefore, his administration of a 16-hour performance award was justified.

However, the following evidence clearly refuted [REDACTED] assertions that Complainant's appraisal was "pedestrian" and his stated reasons for the performance award downgrade. Specifically, on July 17, 2012, [REDACTED], Complainant's rater, digitally signed an annual DA Form 7222, "Senior System Evaluation Report," that evaluated Complainant for the reporting period August 1, 2011, through July 31, 2012. Part I of the report (administrative data) noted Complainant's position title [REDACTED]

[REDACTED]

[REDACTED] documented Complainant's daily duties and scope as:

- [REDACTED]
- [REDACTED]
- [REDACTED]
- [REDACTED]

[REDACTED]

- [REDACTED]
- [REDACTED]
- [REDACTED]; and
- [REDACTED]

[REDACTED] commented on Complainant's values during the reporting period and highlighted that Complainant:

- demonstrates unwavering courage and conviction;
- does the right thing every time regardless of criticism;
- work and word are his bond;
- honest and candid in all relationships;
- never withholds or embellishes information for personal gain, thus earning the respect of all those with whom he interacts;
- inspires others by setting the highest standards and leading by example;
- is concerned about the welfare of his staff and all members of SOCAFICA and operational control organizations;
- has integrity unmatched; and
- consistently speaks the truth and this is the center of his belief and the core of his work ethic.

[REDACTED] rated Complainant's performance, including performance as a supervisor and manager, as "Excellence [*sic*]" and provided the following examples of Complainant's performance, in part, that Complainant:

- continues to provide superb guidance and leadership to seniors, peers, and subordinates;
 - exceeded all of his stated objectives;
 - tireless efforts have been lauded at all levels; and
 - is a proven performer and considered a critical resource to the command.
- [REDACTED]

On September 17, 2012, [REDACTED], as senior rater, rated Complainant's performance as the highest possible, a "Successful (1 block)" and made the following comments, in part:

- Complainant's performance during the rating period couldn't have been better;
- He exceeded all of his stated objectives which dramatically improved SOCAFRICA's operational capability;
- [REDACTED];
- His performance is the best I've seen to date; his potential to serve in a higher grade is unlimited;
- Truly the best of the best!

On or about September 17, 2012, [REDACTED] provided [REDACTED] Complainant's 2011-2012 DA Form 7222 for approval of a 40-hour performance award. [REDACTED] testified that when he submitted Complainant's DA Form 7222 to [REDACTED]:

... I told [REDACTED] that I wrote the award in and said, “Frankly, sir, I have – I have nothing to appeal to other than I believe that [Complainant] has done a good job for me and it would be a good turn for the command to provide [Complainant] with a time-off award,” and [REDACTED] thanked me for bringing it to his attention. [REDACTED] didn’t make a decision in front of me.

██████████ testified he recommended Complainant receive the 40-hour performance award for the good work he had done. ██████████ went on to say he returned later to retrieve the award recommendation package and that ██████████ had marked out his 40-hour performance award recommendation and penciled in "16 hrs."

██████████ testified his discussions with ██████████ about Complainant's performance award occurred after ██████████ had administered the performance award.

_____ stated he gave Complainant a "Successful (1 block)" rating because he was _____

_____ said
he thought the reason why _____ gave Complainant a lowered amount "was that
_____ felt like [Complainant] was not as committed to doing his job as he could have been
and he felt like that he could have done more and it wasn't, he was not giving a hundred percent
effort." _____ went on to say _____ was not required to administer Complainant a
40-hour performance award merely because it was authorized.

On September 19, 2012, [REDACTED] approved a 16-hour performance award for Complainant.

Complainant believed his testimony in the [REDACTED] CDI involving [REDACTED], and RDML Losey's suspicions that he, [REDACTED], and [REDACTED] were responsible for the anonymous IG complaints, directly related to the performance award he received from [REDACTED].

[REDACTED] statements regarding Complainant's performance contradicted [REDACTED] assessment of Complainant's "pedestrian" performance. We concluded that [REDACTED] did not provide clear and convincing evidence to support his reasons for reducing Complainant's performance award from 40 hours to 16 hours.

Motive

Evidence revealed [REDACTED] motive was based on the perceived disclosures that cast the command in a negative light and were viewed as attempts by Complainant, [REDACTED], [REDACTED] to undermine RDML Losey's command. Further, [REDACTED] and the command group referred to Complainant, [REDACTED], [REDACTED], and [REDACTED] as [REDACTED] "and "cabal."

[REDACTED] testified that [REDACTED], [REDACTED], [REDACTED] SOCAFRICA, coined the term [REDACTED], "that it was a pejorative term describing a group limited to "... [REDACTED], [REDACTED], and [REDACTED], mainly," and that he ([REDACTED]) used the term [REDACTED] "with [REDACTED].

[REDACTED] testimony indicated that the use of the term "[REDACTED]" was condoned by RDML Losey, which gave an impression that using the term was acceptable within the command group.

The evidence established RDML Losey and [REDACTED] used the term "cabal" to identify a group of civilians they believed to be out for their own self-interest and used a self-described pejorative term to identify Complainant. These two terms "cabal" and "[REDACTED]" involved the same group of civilian employees, including Complainant, whom [REDACTED] identified as intent on undermining the SOCAFRICA command.

On May 7, 2015, [REDACTED] responded to our preliminary report and did not dispute our finding that he used the terms "cabal" and "[REDACTED]," which involved the same group of civilian employees, including Complainant, whom [REDACTED] identified as intent on undermining the SOCAFRICA command. Additionally, [REDACTED] did not address our finding that he perceived and had actual knowledge of Complainant's protected disclosures and that they were a factor in his decision to downgrade Complainant's performance award.

[REDACTED]

Disparate Treatment

We also reviewed evidence reflecting similarly situated SOCAFRICA civilian employees with a "Successful (1 block)" appraisal rating who received a 40-hour time-off award, quality step increase, or cash award. Of the seven employees with Successful ratings and who received time-off awards, Complainant was the only one who received less than a 40-hour time-off award. The evidence reflected Complainant was the only SOCAFRICA civilian employee with the highest performance appraisal rating who received a disparate award amount in comparison to other high performing SOCAFRICA civilian employees who were not whistleblowers.

We did not find clear and convincing evidence that [REDACTED] would have administered Complainant a 16-hour performance award absent Complainant's perceived and protected disclosures. Accordingly, the preponderant evidence that Complainant's perceived whistleblowing was a contributing factor in the decision to reduce the award establishes that the action was taken in reprisal.

*LOR**RDML Losey*

RDML Losey departed the SOCAFRICA Commander position on June 7, 2013; became the Naval Special Warfare Commander in Coronado, California on June 21, 2013; and was not a signatory on Complainant's July 3, 2013 LOR. Although evidence indicated RDML Losey inquired about the status of [REDACTED] requested disciplinary actions prior to his departure, we found insufficient evidence to support finding that RDML Losey influenced [REDACTED] in either recommending any disciplinary action at all or any particular level of discipline against Complainant.

Stated Reasons for [REDACTED] imposition of a letter of reprimand

We interviewed [REDACTED] on June 20, 2013, prior to his administration of Complainant's LOR. [REDACTED] testified to us that he had a pending disciplinary action against Complainant "to hold him accountable for misconduct ..." and that Complainant was "going to get a memo (LOR) from me before he leaves whether AFRICOM legal signs off on it or not." [REDACTED] said he intended to hold Complainant accountable for "... fraud, waste, and abuse." Further, [REDACTED] stated he was going to personally administer Complainant a memo before Complainant departed SOCAFRICA despite lack of "support from higher headquarters."

[REDACTED] stated that after the time and attendance CDI results, he felt Complainant's "level of misconduct ... just kind of puts me over the edge ... I think [Complainant] needs to be absent from work ... and everybody needs to know that he was directed to be absent from work for a reason ... and those that were part or subject to being culpable in his misconduct will understand, and that's the point." However, [REDACTED] acknowledged an AFRICOM JA's legal review and opinion [REDACTED]

[REDACTED] stated while the AFRICOM [REDACTED]

[REDACTED]

legal review memo discussed the proposed disciplinary action (termination) concerning [REDACTED], he believed it was “in general to the allegations for all three individuals.” When asked what his proposal for disciplinary action concerning Complainant was based upon, [REDACTED] testified to us, “My research, and that of an independent investigator conducting a 15-6 [CDI].”

On July 3, 2013, [REDACTED] administered Complainant an LOR for failure to follow policy. The LOR specified that from August 29, 2010, through July 1, 2012, Complainant failed to adhere to the letter and intent of DoD FMR, [REDACTED] Policy Directives, and ACSOI 1400.02 [REDACTED]

On May 7, 2015, [REDACTED] responded to our preliminary report and provided no additional information distinct from his prior testimony about the reasons he administered Complainant an LOR.

Motive

As discussed earlier, we concluded that [REDACTED] perception that Complainant made protected disclosures was a factor in [REDACTED] decision to award Complainant a 16-hour performance award and administer him an LOR. The content of the anonymous IG complaints cast the command in a negative light, and [REDACTED] believed they were an attempt by Complainant to undermine the command. Further, [REDACTED] and the command group referred to Complainant, [REDACTED] as “[REDACTED], [REDACTED]” and collectively referred to Complainant, [REDACTED], [REDACTED] and [REDACTED] as “the cabal.”

[REDACTED] referred to the time and attendance CDI results as the basis for his decision to administer Complainant an LOR. However, we reviewed the CDI and identified problems with the thoroughness and scope of investigation. Specifically, while the stated scope of the CDI was the SOCAFRICA civilian pay system, evidence indicated [REDACTED] focused on reviewing the time and attendance of Complainant, [REDACTED], [REDACTED], and [REDACTED] rather than others throughout SOCAFRICA. While [REDACTED] testified to us that he reviewed time and attendance records for a large number of SOCAFRICA employees, [REDACTED] [REDACTED], stated that [REDACTED] only requested the timekeeping records for the four individuals. These four individuals were suspected by RDML Losey, who communicated that suspicion to [REDACTED], of making the IG complaint.

[REDACTED] corroborated [REDACTED] statement and testified that [REDACTED] only requested time and attendance records concerning [REDACTED], Complainant, [REDACTED], and [REDACTED], and that he believed the CDI was investigating only them for time and attendance violations.

The CDI findings disclosed disparities with out-of-sequence ATAAPS certifications and identified those certifications actions as misconduct by Complainant, [REDACTED], [REDACTED], and [REDACTED]. However, data from an October 2012 AFRICOM IG inspection that covered [REDACTED]

the period October 2011-October 2012 identified out-of-sequence certifications had occurred throughout SOCAFRICA and were not limited to just Complainant and three other employees as reflected in the CDI findings. The AFRICOM IG inspection data identified improperly built organizational hierarchies within ATAAPS as a root problem for out-of-sequence certifications.

While on its face RDML Losey's appointment was for a CDI into SOCAFRICA's civilian pay system irregularities, in fact, [REDACTED] focused his examination on alleged time and attendance misconduct by Complainant, [REDACTED], [REDACTED], and [REDACTED]. In spite of the apparent discrepancy between the broad CDI scope as appointed and the narrowed scope of the actual CDI report as conducted, RDML Losey did not return the CDI for further investigation consistent with the language of the appointment but instead approved the CDI as submitted. Moreover, the AFRICOM legal review of [REDACTED]

[REDACTED] Although AFRICOM did not provide a legal review of [REDACTED]'s proposed disciplinary action concerning Complainant, [REDACTED] relied on the same body of evidence (the time and attendance CDI) to support Complainant's proposed disciplinary action that an AFRICOM legal review [REDACTED]. As referred to above, the AFRICOM SJA testified:

... [REDACTED]

[REDACTED]

Additionally, he stated tha [REDACTED]

[REDACTED]

The evidence showed that [REDACTED] pursued disciplinary action contradictory to both the recommendations contained in the time and attendance CDI (i.e., verbal counseling) and the AFRICOM JA legal review [REDACTED].

[REDACTED] *Credibility and Prior Inconsistent Testimony*

Finally, the DoD OIG previously found that [REDACTED] provided conflicting testimony in our investigation of reprisal against [REDACTED] by RDML Losey. In one instance, [REDACTED] denied hearing RDML Losey say he had narrowed his suspicions down to three

[REDACTED]

people, but in another instance he testified RDML Losey “wondered aloud” and “rattled off a couple names” who he thought made the IG complaint [REDACTED] also denied attempting to do a change of rater “shuffle” to prevent [REDACTED] from receiving [REDACTED]. However, his testimony contradicted his earlier email to [REDACTED] in which he said he was going to do a shuffle to prevent [REDACTED].

[REDACTED] also told us that RDML Losey wanted to send [REDACTED] up to AFRICOM and “be done with it,” but RDML Losey had specifically told the AFRICOM CoS, “... placing him at HHQ [Headquarters] would not be something I would advocate.” [REDACTED] was also heavily involved in helping [REDACTED] get transferred to [REDACTED], but he told us he had no idea how [REDACTED] “PCA’d [permanent change of assignment] to [REDACTED].” [REDACTED] also denied having a conversation with the [REDACTED], about warning RDML Losey about reprisal, but [REDACTED] wrote an MFR on November 4, 2011, documenting their conversation. [REDACTED] also testified he did not find out about the IG complaint until after [REDACTED] had departed, but in another instance, he said RDML Losey confided in him about the IG complaint in October 2011, the month prior to [REDACTED] departure. In short, we found conflicting testimony from [REDACTED] that undermined the credibility of his denials of reprisal to us.

Disparate Treatment

SOCAFRICA produced no evidence of similarly situated employees who were disciplined for time and attendance misconduct. However, testimonial and documentary evidence demonstrated that Complainant was the only SOCAFRICA employee disciplined as a result of the CDI findings.

We did not find clear and convincing evidence that [REDACTED] would have administered Complainant a letter of reprimand absent Complainant’s perceived and protected disclosures. Accordingly, the preponderant evidence that Complainant’s perceived whistleblowing was a contributing factor in the decision to administer the letter of reprimand establishes that the action was taken in reprisal.

VI. CONCLUSIONS

We conclude that:

A. [REDACTED], inconsistent with the principles of 5 U.S.C. 2302, administered Complainant a reduced 16-hour performance award in reprisal for perceiving Complainant to have made two anonymous IG complaints.

B. [REDACTED], inconsistent with the principles of 5 U.S.C. 2302, administered Complainant an LOR in reprisal for perceived protected disclosures by Complainant.

[REDACTED]

C. RDML Losey did not take or fail to take, or threaten to take or fail to take, or influence others to take, threaten to take, or fail to take any personnel action in reprisal for perceiving Complainant to have made two anonymous IG complaints.

VII. RECOMMENDATIONS

A. We recommend that the Secretary [REDACTED]:

- grant Complainant a performance award commensurate with his performance evaluation for 2012;
- ensure that the Letter of Reprimand has been officially removed from files pertaining to Complainant and is not contained in Complainant's official record;
- determine whether Complainant's professional or promotion opportunities may have been impacted as a result of the administration of the LOR and, if so, direct that remedial action be taken.

B. We recommend that the Secretary [REDACTED] take appropriate action regarding [REDACTED] substantiated reprisal against Complainant.

[REDACTED]

[REDACTED]



[REDACTED]

[REDACTED]